IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1190 of 1993

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BUDHABHAI RAIJIBHAI PARMAR - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR DF AMIN for Appellant(s) : 1,
MR ND GOHIL APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 20/09/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE BANKIM.N.MEHTA)

1. The appellant has preferred this appeal under Section 374 (2) of the Code of Criminal

Procedure, 1973 and challenged the judgment dated 23-9-1993 passed by the learned Sessions Judge, Panchamahals at Godhara in Sessions Case No. 86 of 1993 convicting him for the offence punishable under Section 302 of the I.P. Code and sentencing him to undergo life imprisonment and to pay fine of Rs.500/-, in default thereof, to undergo simple imprisonment of two months.

2. In brief the prosecution case was that on 14-4-1993 at about 9-45 at night Budhabhai the husband of complainant Chaturiben went to the village to bring beedies and sweet fennel seeds as Budhabhai, Chaturiben and her father-in-law deceased Gajabhai had finished their dinner. Gajabhai was lying in the front portion of the house and their three children had gone for dinner at Patwala “falia” in the village. At that time, the accused, staying opposite the house of Chaturiben was quarreling with his wife Sharda. The accused came out of his house and started giving abuses to Chaturiben saying that why she ridiculed him before his brother-in-law by saying that they (the accused and his wife) were quarreling. Therefore, Gajabhai who was lying in front of the house came out and asked the accused as to why he (the accused) was abusing his daughter-in-law Chaturiben. This enraged the accused who lifted a wooden log

lying near his house, came running towards Gajabhai saying 'I will show you whether you want to live or die' and gave pushes of the wooden log below Gajabhai's chest, who fell from down on 'otla' and succumbed to the injuries. Amrat the wife of brother of the accused came running and took away the wooden log from the accused. Chaturiben informed her husband and other persons of the 'falia' who came there about the incident. Thereafter, the husband of Chaturiben went to village Akali to inform his sister Shantaben who returned around 3-00 O'clock at night (early morning) and thereafter Chaturiben and her husband went to lodge compliant.

3. On the basis of complaint lodged by Chaturiben daughter in law of deceased Gajabhai Mohanbhai offence was registered as I – CR No. 95 of 1993 before Kalol Police Station for the offences punishable u/s 302 of the I.P. Code and u/s 135 of the Bombay Police Act and investigation was started. During the investigation, muddamal wooden log was discovered at the instance of the accused. The panchnama of scene of offence, inquest panchanama and panchanama of discovery of muddamal wooden log were drawn and dead body of Gajabhai Mohanbhai was sent for postmortem. The accused was

arrested.

4. On completion of the investigation, charge sheet was laid before the learned Judicial Magistrate,First Class, Kalol, District Panchamahals for the offences punishable u/s 302 of the I.P. Code and u/s 135 of the Bombay Police Act against the accused. As the offence was triable by the Court of Sessions, the case was committed to the Sessions Court, Panchamahals at Godhara and it was registered as Sessions Case No. 86 of 1993. Learned Sessions Judge, Panchamahals at Godhara framed charge Exh. 1 against the accused for the offences punishable u/s 302 of the I.P. Code and u/s 135(1) of the Bombay Police Act and the same was read over and explained to the accused who pleaded not guilty to the charge and claimed to be tried. The prosecution adduced evidence to prove the charge. On closure of recording of evidence by prosecution the learned trial Judge explained to the accused the incriminating circumstances appearing against him in the evidence. The accused in his further statement recorded under Section 313 of the Cri. Procedure Code denied having committed the offence and stated that false case is filed against him.

5. After hearing the learned A.P.P. for the

State and the learned advocate for the accused, the learned trial Judge found the accused guilty for the offence punishable under Section 302 of the I.P. Code and sentenced him as mentioned hereinabove but acquitted for the offence punishable u/s 135 (1) of the Bombay Police Act. Being aggrieved and dissatisfied with the said judgment, the accused has preferred the present appeal.

6. We have heard the learned advocate for the appellant and learned A.P.P. at length and in great detail. We have also perused the judgment and record and proceedings of th trial court.

7. Learned advocate for the appellant submitted that the prosecution has examined only interested witnesses. He also submitted that the presence of the eye witnesses becomes doubtful and they claim to be eye witnesses only with a view to support the prosecution case. The eye witnesses are got up witnesses and therefore their presence at the time of the incident is doubtful and hence their evidence cannot be relied upon. He submitted that from the medical evidence it can be said that at the most the accused committed the offence punishable u/s 326 of the I.P. Code and therefore conviction of the appellant recorded by the trial Court requires to

be set aside. He, in the alternative, submitted that the appellant had no intention to cause death of Gajabhai Mohanbhai and on account of sudden quarrel the incident occurred. Hence, the case of the appellant would fall under the exceptions to Section 300 of the I.P. Code. In support of his arguments, learned advocate for the appellant relied on the decision of the Hon'ble Supreme Court in **Karam Singh Vs. State of Punjab, reported in 1994 SCC 64**.

8. Learned A.P.P. Mr. N.D. Gohil, appearing for the respondent – State vehemently opposed the appeal and submitted that the medical evidence indicates that the injuries were inflicted on the vital part of the body and the same were inflicted with predetermination. He submitted that the eye witnesses are natural witnesses and therefore their presence at the place of the incident is natural. There is nothing to indicate that the appellant is falsely implicated in the offence. He submitted that the prosecution proved the case beyond reasonable doubt against appellant. Therefore, no interference is warranted in the impugned judgment and the appeal is required to be dismissed.

9. The prosecution case mainly rests on the evidence of P.W. 1 Chaturiben at Exh. 5 who has lodged the complaint, P.W. 3 Sarojben Budhabhai and P.W. 4 Amrutben Haribhai who are the eye witnesses and P.W. 2 Dr. Tushar Kirtikumar Soni Exh. 8. Out of these witnesses, P.W. 4. Amrutben Exh. 11 has turned hostile and has not supported the prosecution case. The conviction is based on the evidence of

10. In order to prove that death of deceased Gajabhai Mohanbhai was homicidal in nature, the prosecution examined P.W. 2 Dr. Tushar Kirtikumar Soni at Exh. 8. He deposed that the external injuries found on the dead body of deceased Gajabhai Mohanbhai were recorded in Column No. 17 and internal injuries were recorded in Column No.18 of postmortem report Exh. 9. He also deposed that internal injuries were corresponding to the external injuries and the injuries were sufficient in the ordinary course of nature to cause death. He also deposed that cause of death was due to haemrrohagic shock following rupture of liver. In the cross-examination, the witness denied that fracture injuries could be caused on account fall of aged person on land. He also admitted that the injuries found on the dead body of deceased Gajabhai Mohanbhai were possible by muddamal

article wooden log. Except that there is no other cross-examination with regard to the injuries.

11. The prosecution also produced postmortem report at Exh. 9 which indicates external and internal injuries found on the dead body of Gajabhai Mohanbhai. It indicates that cause of death was due to haemrrohagic shock following rupture of liver. In view of this evidence, it becomes clear that the deceased died on account of the injuries sustained by him and such injuries were possible by muddamal article wooden log. The defence has not been able to elicit that cause of death of the deceased was on account of fall on 'otla'. The external injuries were found on the vital part of the body. Therefore, it becomes clear that death was homicidal in nature.

12. The prosecution examined P.W. 1 Chaturiben Budhabhai at Exh. 5 who filed the complaint with regard to the incident. The witness deposed that the accused and his wife were quarreling at their house and the accused came near her house and gave abuses. She further deposed that her father-in-law was lying on 'otla' and he told the accused as to why he was giving abuses to his daughter-in-law. She further deposed that the

accused took the wooden log and gave three pushes on her father-in-law's chest who fell down; that her daughter bought water but the deceased but he could not gulp it. She further deposed that thereafter her husband who had gone to village returned and he was informed about the incident; that thereafter her husband went to village Rangdi to call her sister-in-law and returned late night at 2-00. In the cross-examination, she deposed that there was no enmity between their family and the family of the accused before the incident. She denied that her father-in-law i.e. the deceased was being treated for chest injuries and stomach ailment. She also deposed that there was no commotion at the time of the incident.

13. Learned advocate for the appellant submitted that looking to the evidence of this witness, presence of this witness becomes doubtful as all other neighbours were attending a marriage function and therefore it would be difficult to believe that she was present at the time of occurrence. In our view, the evidence indicates that the witness, her husband and the deceased did not go to attend the dinner but took the diner at their house. This conduct is not unusual because the other family members went to attend the function. Therefore, it cannot be

said that the presence of the witness is doubtful. On the contrary, it becomes clear from the evidence that she witnessed the incident as she had narrated the incident in detail. The defence has tried to demonstrate some contradictions in her deposition. But in our view, these contradictions are not major contradictions which would go to root of the case. It also appears from the evidence that there was quarrel between the family of the witness and the family of the appellant. Therefore, it would be difficult to believe that the witness would falsely implicate the appellant.

14. The prosecution produced F.I.R. at Exh. 7 which indicates that the incident took place at 21-45 hours on 14-4-1993 and was reported to the police at about 06-15 hours on the next day. The evidence of P.W. 1 Chaturiben Exh. 5 indicates that after the incident the husband of the witness went to nearby village to call sister-in-law i.e. the daughter of deceased Gajabhai and returned late at night. There is no cross-examination with regard to this aspect. In view of this evidence, the witness has explained the delay and the defence has not been able to demonstrate that the delay is unexplained. Therefore, in our view, it would be difficult to

believe that there was unnecessary delay in lodging F.I.R. It also appears from the F.I.R. that all the details about the incident and involvement of the appellant are given. Therefore, in our view, the prosecution proved beyond reasonable doubt that the appellant was involved in the offence.

15. The prosecution examined P.W. 3 Sarojben Budhabhai at Exh.10. She is the daughter of P.W.1 Chaturiben. It appears from her evidence that the appellant and his wife were quarrelling in their house and thereafter the appellant came out of his house and started giving abuses to her mother i.e. P.W. 1 Chaturiben Budhabhai Exh. 5. Therefore, the deceased tried to intervene by saying as to why he (the accused) was giving abuses. Hence, the appellant brought wooden log from his house and inflicted two blows on the chest of the deceased. It also appears from the evidence of this witness that the deceased fell on 'otla' in upward position. The defence has not been able to demonstrate that the presence of this witness is not probable. On the contrary, it appears from the cross-examination of this witness that the witness returned home from the function after taking the dinner. The defence has tried to prove some contradictions but the contradictions are not fatal to the prosecution

case.

16. The prosecution examined another eye witness P.W, 4 Amrutben Haribhai at Exh. 11. The witness initially supported the prosecution case. But in the cross-examination she took summer-sault and supported the defence. Therefore, the witness was declared hostile and was cross-examined by the learned A.P.P. But the witness was not cross-examined by the learned A.P.P. on material aspects. On overall appreciation of evidence of this witness, we find that the deposition of the witness does not support the prosecution case and her deposition does not support the prosecution case and her deposition does not connect the appellant with the offence.

17. The prosecution examined panch witness P.W. 5 Hirabhai Somabhai at Exh. 12. It appears from the evidence of this witness that the witness was Officer in Home Guard Force and the weapon used in the evidence was discovered at the instance of the appellant. The defence has tried to demonstrate that the witness is not reliable by putting questions in the cross-examination that she has to go to police station for “bandobast” he has good relations with the police and therefore he has given false deposition. In our

view, simply because the witness is in Home Guard Force and is required to go to police station for making 'bandobast', his deposition cannot be thrown away. It cannot be believed that he had close relation with the police department because he was in Home Guard Force and therefore he is falsely implicating the appellant. Therefore, in our opinion, the deposition of this witness can be safely relied on to connect the appellant with the discovery of the weapon used in the offence.

18. The prosecution produced discovery panchanama at Exh. 13. It indicates that the muddamal wooden log was discovered at the instance of the appellant from the loft of his house. In our view, the panchanama implicates the appellant in the offence.

19. The prosecution also examined Investigating Officer P.W. 6 Gopalsinh Jagatsinh at Exh. 14. who carried out investigation. The defence has not been able to demonstrate that the witness did not carry out proper investigation.

20. In view of above, it emerges that the prosecution proved the charge beyond reasonable doubt that deceased Gajabhai Mohanbhai sustained fatal injuries on account of blows

inflicted by the appellant with wooden log. Now, only the question, remains to be determined is whether it can be said that the offence is of murder or culpable homicide not amounting to murder.

21. It appears from the evidence of P.W. 1 Chaturiben Budhabhai Exh. 5 that there was quarrel between the appellant and his wife in their house. Thereafter, the appellant came out of his house and started giving abuses to the witness which enraged the deceased who was father-in-law of the witness. The evidence of this witness also indicates that the deceased asked the appellant as to why he was giving abuses to his daughter-in-law P.W. 1 Chaturiben and upon asking this the appellant got furious and lifted wooden log lying near his house and inflicted two blows below the chest of the deceased. This evidence of the witness clearly indicates that the incident occurred on account of sudden quarrel. In view of this, it becomes cleat that the offence is committed without predetermination, and in the heat of passion as there was quarrel between the deceased and the appellant. In view of the fact that two blows were given below the chest and there was no other external injury, it can be said that the offender did not take undue advantage or acted

in cruel or unusual manner. Therefore, we are of the opinion that the learned trial Judge was not justified in recording the conviction of the appellant for the offence punishable u/s 302 of the I.P. Code. The evidence indicates that the injuries were inflicted below the chest by the wooden log. Therefore, it can be said that the appellant had knowledge that such injuries is likely to cause death but had no intention to cause death. Hence, the conviction of the appellant recorded by the trial court is required to be altered from Section 302 of the I.P. Code to Section 304 Part-II of the I.P. Code.

22. As we have altered the sentence from Section 302 to 304 Part-II of the I.P. Code, the learned advocate for the appellant was heard on the question of sentence. Learned advocate for the appellant submitted that the appellant belongs to a poor strata of the society and is a rustic villager. He has family liability and considering the manner and in the circumstances in which the offence was committed the court should take lenient view. It is also submitted that the appellant has already undergone imprisonment for more than six years and five months and was released in 1999 on bail during pendency of the appeal. He also submitted that the manner in which the offence is committed the period of imprisonment already undergone by the appellant

would be adequate punishment for the offence punishable u/s 304 Part-II of the I.P. Code.

23. Considering the overall evidence and submissions made by the learned counsel for the parties, we are of the view that adequate punishment for the appellant would be the period of imprisonment already undergone by him for the offence of culpable homicide not amounting to murder u/s 304 Part-II of the I.P. Code. Therefore, we deem it fit, just and proper to alter the conviction from Section 302 to Section 304 Part – II of the I.P. Code and the appellant is sentenced to undergo rigorous imprisonment for the period already undergone by him.

24. Learned advocate for the applicant in support of his argument that the case would fall under Section 304 Part-II of the I.P. Code relied on the decision of the Supreme Court in Kara **Sigh Vs. State of Punjab**, reported in **1994 Supreme Court Cases (Cree.) 64**, wherein the Supreme Court altered **conviction to Section 304 Part-II of the I.P. Code as death was caused by inflicting "lath" blows on the chest of deceased which resulted in rupture of liver and the spleen**. In the present case, the appellant inflicted wooden log blows below the chest of the deceased which

resulted in rupture of liver. Therefore, the decision of the Supreme Court squarely applies to the facts of the present case.

25. For the foregoing reasons, the appeal is partly allowed and conviction of the appellant recorded by the judgment and order dated 23-03-1993 passed by the learned Sessions Judge, Panchamahals at Godhara in Sessions Case No. 86 of 1993 for the offence punishable u/s 302 of the I.P. Code is altered from Section 302 of the I.P. Code to Section 304 Part-II of the I.P. Code and the appellant is sentenced to undergo sentence of rigorous imprisonment for the period already undergone by him. The muddamal be disposed of as directed by the trial Court.

(A.L. Dave, J.)

(Bankim N. Mehta,J.)

/JVSatwara/